Supreme Court, U.S.
FILED
OCT 16 '02
OFFICE OF THE CLERK

No. 02-0417

In The

Supreme Court of the United States

DONAN B. MCAULEY,

Petitioner,

vs.

DORIS J. KENNAY, Individually and d/b/a IN TOTIDEM VERBIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari purports to identify the Illinois Supreme Court as a party to this proceeding. The Illinois Supreme Court is not properly designated as a Respondent to the Petition for Writ of Certiorari, in that the Illinois Supreme Court is not a party hereto.

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STATEMENT OF THE CASE

The Illinois trial court and the Illinois Third District Appellate Court have each independently found that the Petitioner has abused judicial process and pursued frivolous litigation in this small claims cause of action. The Petitioner's Petition for Writ of Certiorari represents a continuation of that abuse.

The Petitioner is an attorney. The Respondent, Doris Kennay, Individually and d/b/a In Totidem Verbis, is a court reporter who owns a court-reporting agency which employs other court reporters.

On January 13, 1998, the Respondent, through one of her employees, attended and reported two discovery depositions which took place in connection with a federal lawsuit in which the Petitioner was counsel of record for the plaintiff. (R-14, 15, 16.) The Petitioner, as counsel for plaintiff, requested, scheduled and took the discovery deposition of an agent of the opposing party. (R-51, 53, 94.) Though testimony at trial was conflicting, the trial court found that the Petitioner ordered deposition transcripts from the Respondent, and thereafter received deposition transcripts from the Respondent. (R-150.) The Respondent thereafter refused to pay the Petitioner's bill for services and transcripts, in the total amount of $696.90.

The Respondent brought suit against the Petitioner in Illinois small claims court. (C-5.) The Petitioner filed various motions to strike, motions to dismiss and motions for summary judgment. (C-8 through C-20.) The Petitioner also filed a counterclaim against the Respondent, alleging that the Respondent had violated the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). (C-107 through C-114.) The trial court found and the Illinois Appellate Court affirmed that

there was no legal or factual basis for the Petitioner's claim that the Respondent had acted as a finance agency in a credit transaction, and therefore the Petitioner's counterclaim was dismissed. (C-3, Pet. App. 5., Resp. App. 1-11.)

On October 25, 1999, the trial court, after bench trial, expressly found that the Petitioner had, in fact, requested the transcription of one deposition and a copy of the transcription of another. The Court thereupon entered judgment in favor of the Respondent and against the Petitioner in the amount of $696.60 plus costs of suit. (R-152.)

The trial court then proceeded to hearing on the issue of whether sanctions should be imposed upon the Petitioner arising from his conduct with respect to the issuance and service of certain subpoenas duces tecum. (R-152.) During the announcement of its findings against the Petitioner, the trial court stated as follows:

> In the three years that I have been on the bench, almost three years, this has been, without a doubt, the most clear-cut example that I have ever encountered of burdensome proceedings in a small claims case, and in this instance, an abuse of the subpoena powers of the court.
>
> (R-183.)

The Petitioner then appealed from the judgment entered against him and from the dismissal of his counterclaim. On November 22, 2000, the Third District Appellate Court of the State of Illinois affirmed the trial court's rulings, and entered a further written order on its own motion, finding that the appeal was frivolous and remanding the case to the trial court. (Pet. App. 5, Resp. App. 1-

11.) Within that order, the Appellate Court instructed the trial court to conduct a hearing for the purpose of determining the Respondent's reasonable costs and expenses on appeal, including attorney fees, and to order the Petitioner to immediately reimburse the Respondent for the same. (Pet. App. 5.)

The Petitioner then filed a Petition for Leave to Appeal to the Illinois Supreme Court, therein seeking to challenge the Appellate Court's affirmation of the judgment below, and the Appellate Court's summary imposition of sanctions. The Illinois Supreme Court denied the Petition for Leave to Appeal as to the judgment below, but entered a supervisory order vacating the Appellate Court's summary imposition of sanctions, and directing the Appellate Court to require the Petitioner to show cause why sanctions should not be imposed, and to set forth the reasons and basis for the sanctions if thereafter imposed. (Resp. App. 1.)

On May 17, 2001, the Illinois Third District Appellate Court entered an order vacating its November 22, 2000 summary imposition of sanctions against Petitioner, and ordering the Petitioner to show cause as to why sanctions should not be imposed upon him for filing a frivolous appeal. (Pet. App. 6.) Within its May 17, 2001 order, the Illinois Third District Appellate Court adopted, as its factual findings, the issue as set forth within the Respondent's appellate brief. (Pet. App. 6.) Within its relevant part, that issue was stated as follows:

> In the case at bar, a reasonable, prudent attorney simply would not have conducted himself as did the [Petitioner]. This case began as a pro se court reporter's simple attempt to collect approximately $700.00 in money owed to her for services

> and transcripts ordered by the attorney [Petitioner]. Since then, the [Petitioner] has abused judicial process and bullied the [Respondent] with an onslaught of pleadings and procedural machinations. This case now provides the court with an important opportunity to protect an aggrieved litigant and an abused judicial system from further procedural frivolity which might otherwise be waged by the [Petitioner].

The Petitioner thereafter filed his brief with the Illinois Third District Appellate Court, therein setting forth the reasons why he believed that sanctions should not be imposed against him.

On July 17, 2001, the Illinois Third District Appellate Court entered its written opinion, therein stating, in relevant part, as follows:

> Taken as a whole, the [Petitioner's] appeal was patently frivolous and brought for improper purposes.
>
> (Pet. App. 6 through 8.)

The Petitioner then filed yet another Petition for Leave to Appeal to the Illinois Supreme Court, this time challenging the Illinois Third District Appellate Court's July 17, 2001 order finding that his appeal was "patently frivolous and brought for improper purposes." (Pet. App. 6 through 8.) The Illinois Supreme Court denied the Petitioner's second Petition for Leave to Appeal. The Petitioner has now filed his Petition for Writ of Certiorari, seeking to challenge not only the sanctions imposed against him, but also the order dismissing his counterclaim.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. The issues raised by Petitioner are not compelling.

United States Supreme Court Rule 10 provides, within relevant part, that "a petition for writ of certiorari will be granted only for compelling reasons." In the instant case, the reasons for granting the petition for writ of certiorari are certainly not compelling. Rather, the petition for writ of certiorari arises from the Petitioner's dissatisfaction with rulings made against him in a small claims matter which initially entailed an amount in controversy of less than $700.00.

The issues raised within the Petition for Writ of Certiorari, though couched in terms of presenting some federal question, are in reality nothing more than challenges made to the factual findings of the Illinois courts. Both the Illinois trial court and the Illinois appellate court separately found that the Petitioner's conduct in this case was "frivolous," and an "abuse of process."

The various acts of misconduct by the Petitioner, resulting in the repeated imposition of sanctions against him, are indeed quite disturbing. Sanctions were certainly necessary and appropriate as a remedy for such an ongoing abuse of judicial process. However, the manner in which such sanctions were imposed certainly does not present any issue so important that it must be addressed by the highest Court of the United States. Though the prevention of such abuse is certainly an important objective of our justice system, its occurrence in the instant case is absolutely not "compelling," as that term is defined within the letter and spirit of Rule 10.

2. The state court properly dismissed the Petitioner's counterclaim.

Among the multitude of his other procedural machinations, the Petitioner filed a counterclaim alleging that the Respondent was liable to him for damages arising from Respondent's purported violations of the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). The appellate court found as a factual matter that the Respondent was not a finance agency in a credit transaction, and therefore the Truth in Lending Act is inapplicable. Since the Petitioner's arguments are therefore based upon an issue of fact, no issue of law is presented for the Court to address.

The Petitioner contends that the dismissal of his counterclaim was a "miscarriage of justice," because, according to Petitioner, the lower courts improperly found that Illinois state courts lack jurisdiction to decide the federal issue presented within his counterclaim. Petitioner's argument is based upon a misstatement of the record. The Appellate Court held that because the Respondent is not a finance agency in a credit transaction, the Truth in Lending Act does not apply. Accordingly, though Petitioner states otherwise, the counterclaim was dismissed based upon a factual determination. The Petitioner therefore does not present an issue of law.

3. The Illinois Third District Appellate Court properly imposed sanctions against the Petitioner.

Though the Illinois Third District Appellate Court afforded to the Petitioner fair notice and a reasonable opportunity to show cause as to why sanctions should not be imposed against him, the Petitioner now argues that he did not receive adequate notice of the conduct for which

the state appellate court was considering sanctions. The appellate court adopted, as its findings, those statements set forth within the Respondent's responsive brief to the appellate court. Essentially, the appellate court adopted the finding that "a reasonable, prudent attorney would not in good faith have brought such an appeal." The appellate court then afforded to the Petitioner a reasonable opportunity to file a brief setting forth the reasons why sanctions should not be imposed against him. Though the Petitioner thereupon filed a brief, the Appellate Court found that the arguments of the Petitioner were "specious" and that his appeal was "patently frivolous and brought for improper purposes."

Again, though he characterizes it differently, the gist of Petitioner's argument is that he does not agree with the factual determinations made by the lower court. Since the Petitioner's arguments are therefore based upon issues of fact, no issue of law is presented for this Court to address.

CONCLUSION

The Respondent respectfully requests that the Court shall deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

B. OPINIONS AND JUDGMENT BELOW

1. Letterhead of Supreme Court of Illinois

To: Mr. John [sic] W. Mertes
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No. 90797 – Doris J. Kennay etc., respondent, v. Donan B. McAuley, petitioner. Leave to appeal, Appellate Court, Third District.

"The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause and entered the enclosed supervisory order. The mandate of this Court will issue to the Appellate Court on April 26, 2001.

No. 90797 – SUPERVISORY ORDER

In the exercise of this Court's supervisory authority, the Appellate Court, Third District, is directed to vacate its order in Kennay v. McAuley, case No. 3-99-0951 (November 22, 2000), imposing sanctions upon appellant pursuant to Rule 375. The appellate court is ordered, pursuant to Rule 375, to require the appellant to show cause why the sanctions should not be imposed, and to set forth the reasons and basis for the sanctions if imposed."

2. November 2, 2000 Order of the Third District Appellate Court

ORDER

The Defendant in this small claim action, Donan G. McAuley, appeals the Whiteside County circuit court's judgment in favor of the plaintiff, Doris J. Kennay, d.b.a. In Totidem Verbis, for the amount of $696.60 plus the costs of suit. This court will address the following questions: (1) Is the Illinois Certified Shorthand Reporters Act of 1984 (Act) (225 ILCS 415/1 *et seq.* (West 1994)) constitutional? (2) Did the circuit court err when it dismissed defendant McAuley's counterclaim? (3) Did the circuit court abuse its discretion when it denied the defendant's request for sanctions against the plaintiff? (4) Did the circuit court abuse its discretion when it denied the defendant's request for pre-trial discovery? (5) Did the circuit court fail to base its judgment on the evidence adduced at trial? Because the circuit court concluded properly on all issues, we affirm.

FACTS

The Plaintiff, Doris J. Kennay, individually and d.b.a. In Totidem Verbis (Kennay), is an Illinois certified shorthand reporter. Kennay employed Tammy Jones as a shorthand reporter on January 13, 1998. The defendant, Donan McAuley, is an attorney, upon whose request, Jones, as Kennay's employer, attended and reported two discovery depositions in a federal case. At the deposition, McAuley represented one of the deponents and deposed the other deponent. According to Ms. Jones, after the deposition, she asked McAuley whether she should prepare transcripts for him of the two depositions. He responded by requesting a copy of his client's deposition transcript and an original transcript of the other deposition. McAuley, however, presented testimony indicating that he did not respond to Jones regarding his client's deposition, but rather allowed

his client to request a copy of her deposition transcript. Later by telephone, McAuley requested that Kennay not expedite the transcripts, but send them by regular mail with no copy of exhibits attached to one of the depositions. Kennay thereafter sent the transcripts via certified mail to McAuley with a bill for the amount of $696.90, which McAuley refused to pay. Kennay then filed her small claim complaint. McAuley answered the complaint and additionally counterclaimed, alleging Kennay had failed to comply with the federal Truth in Lending Act (15 U.S.C. 1601 *et seq.*). The circuit court, however, granted Kennay's subsequent motion to dismiss the defendant's counterclaim. Ultimately, based upon its express finding that McAuley had requested the deposition transcriptions, the circuit court entered judgment in favor of Kennay for $696.60 [sic] plus the costs of suit. McAuley now appeals.

ANALYSIS

Is the Illinois Certified Shorthand Reporters Act of 1984 (225 ILCS 415/1 *et seq.* (West 1993)) constitutional? McAuley argues that the Illinois Certified Shorthand Reports Act (Act) is unconstitutional because it (1) is overbroad and vague; (2) is special interest legislation; (3) violates the single-subject rule; (4) conflicts with Illinois Supreme Court Rule 208; and (5) is not severable. In response, Kennay contends that (1) McAuley waived his special interest legislation and single subject rule arguments when he failed to preserve the issues; (2) McAuley lacks standing to claim that sections 12 and 13 of the Act are unconstitutionally overbroad and vague; and (3) the Act is not contrary to Supreme Court Rule 208.

Our review of the constitutionality of the statute is *de novo*. *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, 420, 665 N.E.2d 795 (1996). "It is well-settled that, to preserve an issue for review, a defendant must both contemporaneously object and raise the issue in a post-sentencing motion." *People v. Nielson*, 187 Ill.2d 271, 196, 718 N.E.2d 131, 147 (1999). We agree with Kennay's contention that McAuley did not meet the requirements and, thus, failed to preserve his claims regarding special legislation and the single subject rule. Consequently, we deem them waived.

Next, we consider whether McAuley lacks standing to assert that sections 12 and 13 of the Act are unconstitutionally overbroad and vague. Section 12 states, in pertinent part,

> "no person shall * * * begin to practice in this State or hold himself out as being able to practice shorthand reporting unless he is certified in accordance with the provisions of this Act." 225 ILCS 415/12 (West 1994).

Moreover, section 13 provides, in relevant part,

> "no action or suit shall be instituted, nor recovery therein be had, in any court of this State by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this Act to other than certified shorthand reporters." 225 ILCS 415/13 (West 1994).

"To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *Chicago Teachers Union,*

Local 1, 189 Ill.2d 200, 206, 724 N.E.2d 914, 918 (2000). At bar, the circuit court considered section 28 of the Act in determining McAuley's responsibility for payment of the shorthand reporting services rendered and did not consider sections 12 and 13 of the Act. As sections 12 and 13 are irrelevant to the controversy at issue, McAuley was not in danger of sustaining any injury as a result of the enforcement of these sections as such sections. We, therefore, conclude that McAuley lacks standing to challenge sections 12 and 13 on appeal.

In addressing McAuley's contention that section 28 of the Act conflicts with Illinois Supreme Court Rule 208, we note section 28:

> "A person certified under this Act may hold an attorney, firm, or any other entity personally responsible for payment of shorthand reporting services rendered at the request of that attorney, firm or entity." 225 ILCS 415/28 (West 1994).

Further, Rule 208 states, in pertinent part:

> "The *party* at whose instance the deposition is taken shall pay the fees of the witness and of the officer and the charges of the recorder or stenographer for attending. The party at whose request a deposition is transcribed and filed shall pay the charges for transcription and filing * * * " (Emphasis added.) 134 Ill.2d R 208.

Notwithstanding that the depositions were taken in a federal case pursuant to the U.S. Supreme Court Rules and not the Illinois Supreme Court Rules, we conclude that no conflict exists between section 28 of the Act and Rule 208. As the circuit court concluded, Rule 208 merely governs which side to litigation must pay for a deposition.

Unlike section 28 of the Act, Rule 208 does not govern whether an attorney can be held personally liable for the cost of a deposition that occurs at the attorney's insistence. Thus, McAuley's claim lacks merit.

Did the circuit court err when it dismissed McAuley's counterclaim? McAuley contends that the circuit court erred in granting Kennay's motion to strike his counterclaim since Kennay had not complied with the federal Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). Conversely, Kennay claims that, in addition to the state court's lack of jurisdiction on the federal issue, Kennay never conducted her business as a financial agency in a credit transaction.

Our review of the circuit court's disposition of a 2-619 motion is *de novo*. *Chicago Teachers Union, Local 1 v. Board of Education of City of Chicago,* 189 Ill.2d at 206, 724 N.E.2d at 918. We conclude that, because Kennay did not conduct In Totidem Verbis as a finance agency in a credit transaction, the Truth in Lending Act is inapplicable. See 15 U.S.C. § 1640(e). Thus, the circuit court properly granted the motion to strike.

Did the circuit court abuse its discretion in denying McAuley's request for sanctions against Kennay? McAuley contends that when Kennay's counsel signed the motion to strike McAuley's counterclaim without previously reading the Truth in Lending Act, upon which McAuley based his counterclaim, such signature violated Supreme Court Rule 137.

The decision to impose sanctions rests within the sound discretion of the circuit court. *Health Cost Controls v. Sevilla*, 307 Ill.App.3d 582, 718 N.E.2d 558 (1999). Rule 137 states, in pertinent part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." 155 Ill.2d R. 137.

Due to our previous determination that the Truth in Lending Act is inapplicable in the instant case, we conclude that the circuit court did not abuse its discretion in denying sanctions.

Did the circuit court abuse its discretion when it denied McAuley's request for pre-trial discovery? McAuley contends that he was prejudiced when the circuit court denied him the opportunity to conduct formal pre-trial discovery and to examine Kennay at trial concerning whether and to what extent she had filed an assumed name filing. Kennay, however, contends that the circuit court properly denied McAuley's attempt to perform exhaustive pre-trial discovery.

Supreme Court Rule 287(a) governs pre-trial discovery in small claims cases and states, in pertinent part:

> "No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of court." 134 Ill.2d R 287 (a).

Supreme Court Rule 287(b) further states, in relevant part:

> "In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in the direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties." 134 Ill.2d R. 287 (b).

At bar, McAuley's pre-trial discovery motion requested, *inter alia*, that Kennay produce documents pertaining to Kennay's relationship with Jones, Jones' employee personnel file, Kennay's federal and state income tax documents claiming income or expenses resulting from work that Jones performed, and documents identifying any insurance coverage Kennay paid for relating to Jones. McAuley's request for discovery clearly would have caused unnecessary delay and needless increase in the litigation costs. Hence, the circuit court did not abuse its discretion when it properly applied Supreme Court Rule 287 in denying McAuley's request for pre-trial discovery.

McAuley further asserts that the circuit court committed reversible error when it denied him the opportunity to present an offer of proof regarding whether Kennay lawfully conducted her business using a fictitious or assumed name. McAuley claims that Kennay failed to present any factual evidence supporting that she was engaged in a lawful business. Further, he asserts that she had not, as statutorily required, filed an assumed name business filing. Kennay argues that she did not hold herself out to be a professional corporation, but rather a

sole proprietorship. Moreover, Kennay asserts that McAuley cites no legal authority supporting that an unincorporated employer cannot hold a party liable for breach of a contract entered into with such employer.

Where a party fails to cite supporting authority for his contentions, a reviewing court may deem the argument waived. See Supreme Court Rule 341(e)(7) (177 Ill.2d R. 341(e)(7)). Due to McAuley's failure to provide this court with authority supporting his contentions, we deem this argument waived.

Last, McAuley claims that the circuit court failed to base its judgment on the evidence adduced at trial. Specifically, he contends, *inter alia*, the circuit court (1) improperly denied his statute of frauds assertion, (2) failed to require that Kennay prove her allegation of doing business as In Totidem Verbis, (3) improperly denied McAuley pre-trial discovery, and (4) improperly permitted Kennay to use exhibits without copy. Conversely, Kennay claims that McAuley's argument is based only upon the circuit court's following statement:

> "Everything in my experience as an attorney and everything that I have experienced as an associate judge for almost three years now tells me that Ms. Jones made the – or, inquired as to whether or not transcripts and copies were going to be asked of – or, were going to be requested by the parties, by the attorneys; that that was the manner in which she conducted every deposition, and that she received a response from these respective attorneys as she testified here to (sic) today and as the court has already made reference to."

Further, Kennay argues that the circuit court properly resolved any question of credibility as the circuit court's statement does not indicate that it disregarded the evidence adduced at trial.

We initially note the circuit court's earlier statement, expressing that its role was "to determine * * * the facts of this case and apply the law to the facts * * * and make a determination as to whether or not the plaintiff should, in fact, prevail." Additionally, the record supports the following facts: (1) McAuley scheduled the deposition at issue for January 13, 1998; (2) McAuley was in contact with Kennay prior to the deposition regarding payment of a prior bill; (3) McAuley resolved the payment dispute prior to the scheduled deposition to ensure a court reporter's presence; (4) McAuley represented one of the deponents and deposed the other deponent at the January 13, 1998, deposition; and (5) McAuley ordered a copy of one deposition and an original of the other deposition at issue. Accordingly, we conclude that the circuit court properly determined that McAuley had ordered the deposition transcriptions. We further conclude that the circuit court properly applied section 28 of the Act to its factual finding, entering judgment in favor of Kennay.

CONCLUSION

In sum, we conclude that (1) McAuley lacked standing to argue sections 12 and 13 of the Act are unconstitutionally overbroad and vague; (2) no conflicts exits [sic] between section 28 of the Illinois Certified Shorthand Reporters Act and Supreme Court Rule 208; (3) the circuit court did not err in dismissing McAuley's counterclaim because the Truth in Lending Act is inapplicable; (4) the

circuit court did not abuse its discretion in denying McAuley's request for sanctions; (5) the circuit court did not abuse its discretion in denying McAuley's request for pre-trial discovery; and (6) the circuit court properly based its judgment on the evidence adduced at trial. Accordingly, we affirm.

Affirmed.

KOEHLER, J., with HOMER and LYTTON, JJ., concurring.